R.D. # 009-02
Jersey City New Jersey

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 22

TOWERS OF AMERICA MANAGEMENT, LLC
PRESIDENTIAL PLAZA MANAGEMENT CO.,
N.C. HOUSING ASSOCIATES NO. 100 CO.;
N.C. HOUSING ASSOCIATES NO. 200 C0.;
TOWER OF AMERICA URBAN RENEWAL COMPANY;
30 RIVER COURT EAST URBAN RENEWAL CO.;
TOWER EAST URBAN RENEWAL CO.;
20 RIVER COURT WEST URBAN RENEWAL CO.;
H.P. LINCOLN URBAN RENEWAL CO.

Employers[1]

and CASE 22-RC-12219

LOCAL 971, INTERNATIONAL SHIELD
OF LABOR ALLIANCES (ISLA)

Petitioner[2]

DECISION AND DIRECTION OF ELECTION

The Petitioner filed a petition under Section 9(c) of the National Labor Relations Act, as amended, seeking to represent a unit of superintendents employed by the Employers at nine rental apartment buildings. The Employers contend that they do not constitute a single or joint employer and, therefore, cannot be compelled to bargain

[1] The names of the Employers appear as amended at the hearing.

[2] The name of Petitioner appears as amended at the hearing.

collectively with the Union as representative of a single multiemployer unit. The Employers further contend that the petitioned-for unit is inappropriate because all the superintendents are supervisors under Section 2(11) of the Act.

Based upon the entire record, as described more fully below, I find that the building management companies involved herein, Presidential Plaza Management Co. (PPM) and Towers of America Management, LLC (TAM), collectively referred to as the management companies, constitute a single employer. Additionally, I find that the management companies are joint employers individually with five of the building owners, and with the remaining two building owners collectively, of the respective superintendents for the owners' buildings.[3] However, relying significantly on the Board's decision in *Greenhoot, Inc.*, 205 NLRB 250 (1973), I conclude that an overall employerwide unit of superintendents is inappropriate. I also conclude that the Chief Superintendents are supervisors within the meaning of the Act. I find that only separate units of front line superintendents are appropriate and shall dismiss the petition as it pertains to the five individual building owners who employ either no or one superintendent in their respective units. *Mount St. Joseph's Home for Girls*, 229 NLRB 251 (1977*); World Oil Co.*, 211 NLRB 1024 (1974); *Sonoma-Marin Publishing Co.*, 172 NLRB 625 (1968); *Cutter Laboratories*, 116 NLRB 260 (1956).

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[3] The management companies are joint employers with building owners N.C. Housing Associates #100 Co. (N.C. 100) and N.C. Housing Associates #200 Co. (N.C. 200). The management companies are also joint employers separately and individually with the remaining five building owners: Towers America Urban Renewal Company 30 (Towers Urban); 30 River Court East Urban Renewal Co. (30 River Court); Tower East Urban Renewal Co. (Tower East); 20 River Court West Urban Renewal Co. (20 River Court); and H.P. Lincoln Urban Renewal Co. (H.P. Lincoln).

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding,[4] I find:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.[5]

3. The labor organization involved claims to represent certain employees of the Employers.[6]

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act for the reasons described *infra*:

All full-time and regular part-time superintendents employed by N.C. Housing Associates No. 100 Co., N.C. Housing Associates No. 200 Co., Towers of America Management, LLC, and Presidential Plaza Management Co. at their Presidential Plaza facilities in Jersey City, New

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[4] Briefs filed by the Employers and the Petitioner have been duly considered.

[5] The Employers, New Jersey partnerships, are each engaged in the business of renting apartments and related services at their Jersey City, New Jersey facilities. The parties stipulated and I find that the named Employers are engaged in commerce and subject to the Board's jurisdiction under Sections 2(2), (6), and (7) of the Act. PPM was not named as an Employer in the petition. However, since I find that PPM and TAM constitute a single employer, I find that, as such, they are together subject to the Board's jurisdiction.

[6] The parties stipulated and I find that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

Jersey excluding all clerical employees, porters, doormen, handymen, chief superintendents guards and supervisors as defined in the Act, and all other employees.[7]

I. FACTS

A. BACKGROUND AND PARTIES' CONTENTIONS

Of the nine business entities involved herein, seven own and two manage rental apartments in the following nine buildings:

Building Name, Address	**Building Owner**[8]	**Management Co.**
John Adams, 35 River Dr. South	N.C. 100	PPM
George Washington, 55 River Dr. South	N.C. 100	PPM
James Madison, 30 Newport Pkwy	N.C. 200	PPM
Thomas Jefferson, 40 Newport Pkwy	N.C. 200	PPM
Riverside, One River Ct.	Towers America	TAM
South Hampton, 20 River Ct.	20 River Court	TAM
East Hampton, 30 River Ct.	30 River Court	TAM
The Atlantic, 71 River Ct.	Towers East	TAM
The Lincoln, 204 10th Street	H.P. Lincoln	TAM

The John Adams, George Washington, James Madison and Thomas Jefferson buildings are towers in a gated community called Presidential Plaza. The two owners of the Presidential Plaza buildings each have contracts for the management of their respective properties with PPM. The Riverside, South Hampton, East Hampton and

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[7] There are approximately two employees employed in the appropriate unit.

[8] All of the Employers named in the petition are partnerships. N.C. 100 and N.C. 200 are commonly owned by Newport Associates Development Company (NADC). The evidence does not reflect the identity of the individual partners of the other building owners and the management companies.

Atlantic are towers in a separate gated community called Towers of America. The individual owners of the buildings in Towers of America each have contracts for the management of their respective buildings with TAM. The Lincoln is a separate building near the Towers of America complex owned by H.P. Lincoln, which also has a management agreement with TAM.

Two chief superintendents and six superintendents work in the nine buildings at issue. Manuel Rodriguez is the chief superintendent for Towers of America and the Lincoln and Jose Henriquez is the chief superintendent for Presidential Plaza. Each superintendent, including Rodriguez and Henriquez, works primarily in one or more of the buildings as follows:

Building Name	**Superintendent**
The Atlantic	Manuel Rodriguez (Chief)
Riverside	Victor Pagan
South Hampton	Lauudelino Vargas
East Hampton	Edwin Ramos
The Lincoln	Ariel Ralat
James Madison	Jose Henriquez (Chief) and Pedro Rodriguez
Thomas Jefferson	Jose Henriquez and Pedro Rodriguez
John Adams	Ramon Rodriguez
George Washington	Ramon Rodriguez

The Employers and the Petitioner stipulated at the hearing that the three superintendents who work in Presidential Plaza, if not found to be supervisors, constitute an appropriate bargaining unit and that N.C. 100 and N.C. 200 employ them.

The Employers do not concede that the management companies are joint or single employers of the superintendents with any of the building owners. Petitioner agrees, in its brief, that Manuel Rodriguez is a supervisor under Section 2(11) of the Act. In dispute are:

(1) the single or joint employer status of the two management companies and seven building owners;

(2) the appropriateness of an overall unit including all superintendents;

(3) the supervisory status of the superintendents.

The Employers contend that the individual owners of the Towers of America buildings and the Lincoln, separate from the management companies and the other building owners, each employ one superintendent who cannot be grouped into a multiemployer unit. They argue that five separate superintendent units, consisting of no or one superintendent each, cannot be certified by the Board. *Mount St. Joseph's Home for Girls,* 229 NLRB 251 (1977); *World Oil Co.*, 211 NLRB 1024 (1974); *Sonoma-Marin Publishing Co.,* 172 NLRB 625 (1968).

B. MANAGEMENT COMPANIES

PPM and TAM operate out of the same office located at 25 River Court. They have identical management and nearly identical office staff. For both companies, Fermin Garcia is the General Manager, Lee Auster is the Assistant General Manager and Augustus Smith is the Property Manager. Garcia testified that he is paid and employed by PPM, but holds the same title and performs the same functions for PPM and TAM. The office staff at 25 River Court includes six individuals who, with one exception, perform identical functions for both companies. PPM and TAM managers

report to upper management employed by Mid-State Management Company (Mid-State). It appears that Charles Bellam is the Executive Vice President of Mid-States, PAM and TAM. Mid-State also provides a human resources department and an employee handbook that covers employees at all nine buildings.

The Petitioner entered into evidence the management agreements between each building owner and TAM covering the Lincoln and the Towers of America buildings. Each Tower of America agreement has appended as Exhibit A the management plan for the building. These management agreements and plans describe in significant detail the operation and responsibilities of TAM vis-a-vis the building owner, its structure, managers, staff classifications, personnel policies, employee job descriptions and schedules.[9] According to the Towers of America management plans, the Vice President and General Manager of TAM retain overall responsibility for the proper and efficient performance of operations.

Day-to-day supervision of the superintendents is conducted by the management companies. Garcia testified that superintendents report directly to and meet twice daily with Assistant General Manager Auster. Smith also meets regularly with the superintendents, but less so than Auster. Garcia has less contact with the superintendents than his managerial subordinates, but does contact them regarding certain projects or incidents as the need arises. Garcia testified that TAM and PPM

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[9] The first Towers of America management agreement was signed on July 1, 1995 by PPM rather than TAM. On June 10, 1996, the parties to the July 1 agreement agreed to substitute as the management company TAM for PPM, without changing any substantial provisions. Thereafter, TAM entered into management agreements identical to PPM's initial July 1 contract, except for the name of the management company.

management is hands-on. According to Garcia, all the managers walk the properties regularly and are familiar with work being performed by employees.

The evidence indicates that the management companies are responsible for all hiring, firing, management, supervision, remuneration negotiations, payroll arrangements and other personnel decisions regarding the superintendents and maintenance staff who work in all nine buildings. Indeed, the management companies are responsible for all management and administration of their respective buildings, including upkeep and repairs, rent collection, non-payment proceedings, accounting and payment of expenses. The building owners retain no managerial or administrative responsibility for the buildings and the record contains no evidence that superintendents and maintenance staff report to or deal with the building owners. The building owners merely maintain financial responsibility for expenses, including payroll. The management agreements entered into evidence reflect this division of responsibility, as follows:

> 15. **Employees** – The Management Plan prescribes the number, qualifications and duties of the personnel to be employed in the management of the Project, including bookkeeping, clerical, and other managerial employees. All such personnel will be employees of the Agent and not the Owner, and will be hired, paid, supervised, and discharged by the Agent, subject to the following conditions.
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> a. As more particularly described in the Management Plan, the Superintendent, Handymen, Porters and Doormen will have duties of the type usually associated with their respective positions.
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> b. The compensation (including fringe benefits) of the Superintendent, Handymen, Porters and Doormen will be prescribed in the Management Plan and all applicable union agreements.
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> c. The Owner will pay . . . (ii) compensation payable to the Superintendent, Handymen, Porters, Doormen and rental personnel, as prescribed in the Management Plan, and for all local, state, and federal taxes and assessments . . .

> incident to the employment of such personnel. All such payments will be paid out of the Rental Agency Account and will be treated as Project expenses.

Similarly, the management agreement between H.P. Lincoln and TAM, although stating that the owner rather than the manager shall employ employees, outlines the same division of responsibility between the owner and management company. The agreement states, in relevant part:

> Manager agrees, on behalf of the Owner, to supervise the work of, and to hire and discharge employees. Manager agrees to use reasonable care in the hiring of such employees. It is expressly understood and agreed, however, that all employees . . . are solely in the employ of Owner and not in the employ of Manager and that Manager shall not be liable to employees of Owner for their wages or compensation nor to Owner or others for any act or omission on the part of such employees.

The TAM management agreements provide for the owners to review and approve the budget, presumably including payroll, for their buildings.

C. MAINTENANCE STAFF

As indicated in the plans, the maintenance employees who work in the buildings and whom the Employers claim to be supervised by the superintendents are classified as porters, doormen and handymen.[10] Porters are primarily responsible for cleaning and general upkeep of the properties. Handymen perform repairs on equipment and property that do not have to be done by an outside contractor. Doormen responsibilities include greeting tenants and guests, accepting and distributing deliveries, maintaining logs (i.e., visitors, incidents, etc.) and monitoring the elevators and the building's fire safety command station. Each Towers of America building has

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[10] One utility person/doorman works two days a week in the Lincoln and is paid a rate between that of doorman and handyman.

6 porters, 4 doormen and 2 handymen, except for Riverside, which has 5 porters. The Lincoln has 2 porters, 1 doorman, and 1 utility man/doorman.[11] Approximately 46 maintenance employees, consisting of 23 porters, 16 doormen, 7 handymen, work in the N.C. 100 and N.C. 200 buildings. The porters and handymen apparently work two shifts while the doormen work three.

The maintenance employees are represented for purposes of collective bargaining in six separate units by Local 734, L.I.U of N.A., AFL-CIO (Local 734). Each building owner has an individual collective bargaining agreement with Local 734 except N.C. 100 and N.C. 200, which are parties to a contract covering the entire Presidential Plaza maintenance staff (all four buildings). Garcia negotiated each contract with the Union on behalf of the building owners. The contracts are apparently identical except for the time period they cover and, therefore, certain dates when wage and benefit increases occur. Doormen and porters currently earn $507 per week and handymen earn about $532 per week plus overtime.

There is significant interchange among maintenance employees within their respective gated communities, but not between the gated communities and the Lincoln. Superintendents make regular arrangements between each other to temporarily transfer maintenance employees between gated community buildings to cover for absent employees or provide additional staff when the work load requires. Garcia testified that superintendents have authority to transfer employees between Towers of America buildings and the Lincoln, but that has not happened yet. According to Garcia,

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[11] In total, 51 maintenance employees consisting of 23 porters, 16 doormen, 8 doormen and 1 utility man work in Towers of America and the Lincoln.

maintenance employees may not be temporarily transferred between Presidential Plaza and Towers of America or the Lincoln.

D. SUPERINTENDENTS – ALLEGED SUPERVISORS

The maintenance staff reports to the superintendents, who were all promoted to their current positions from the position of handyman. Superintendents routinely perform handyman repairs themselves.[12] Although the record does not indicate what percentage of time superintendents spend doing handyman repairs and what percentage of time they spend performing other functions, Garcia testified that handyman work is "voluminous." In addition to repair work, superintendents perform daily inspections of their respective properties to determine if maintenance is necessary, complete vacate reports reflecting damage to vacated apartments,[13] requisition materials, review doorman logs, assign tasks to the maintenance staff as necessary, prepare weekly maintenance staff work schedules and prepare payroll sheets on a weekly basis. The record reveals that all the superintendents meet with Auster at least twice daily. At these meetings, Auster notifies the superintendents what maintenance work has to be done on the properties and the superintendents relay that information to the maintenance employees. Superintendents also report to Auster what work is currently in progress, by whom, and the condition of the buildings.

The record revealed a degree of interchange among the superintendents similar to that of maintenance employees. Superintendents cover and assist each other in

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[12] The TAM management plans state that "[a]partment repairs are made by the superintendent or handyman, or by outside contractors where specialized services are required."

[13] Garcia testified that each superintendent will inspect 30 to 40 vacated apartments each day.

Presidential Plaza as do superintendents in Towers of America and the Lincoln.[14] The evidence also indicates some superintendent interchange between PPM and TAM managed buildings. All eight superintendents worked for about two months replacing approximately 1,500 dishwashers in Presidential Plaza. Likewise, the evidence indicates that superintendents can and have been called from one cluster to another in the event of an emergency. For example, about one month prior to the hearing, all the superintendents were called upon to assist when a water pipe broke in the James Madison. In addition to temporary assignments, the evidence indicates that superintendents have been transferred and promoted between buildings. Thus, Manuel Rodriguez was transferred permanently from Chief Superintendent of Presidential Plaza to Chief Superintendent of Towers of America and the Lincoln. Ralat was promoted from handyman at East Hampton to the Lincoln, Pagan was promoted from handyman of the Atlantic to Superintendent of the Riverside, and Laudelino Vargas was promoted from handyman in Presidential Plaza to superintendent of East Hampton.

1. Written Discipline, Suspension and Discharge

The Employers contend that superintendents have authority to discipline and discharge employees. The evidence indicates that only chief superintendents have actually exercised such alleged authority. Manuel Rodriguez testified that he discharged maintenance employees Alex Aries, Alex Agusta, Juan Rivas, Jesus Morales, Hector Martinez and a number of temporary employees when the Towers of America buildings were opening. According to Rodriguez, in each case, he took the employee's time card, notified the employee that he was fired, sent the employee

[14] Ralat testified that a maintenance employee, supervised by Manuel

home, and then notified management regarding the action he took and his reason for it. In each such instance, management accepted Rodriguez' decision and processed necessary paperwork to complete the personnel transaction.

Regarding discipline short of discharge, the Employers introduced into evidence four memoranda reflecting two written reprimands issued by Manuel Rodriguez[15] along with one written reprimand and one written suspension issued by Henriquez.[16] According to Henriquez, the memoranda issued by him were drafted by Office Manager Christine Rodriguez, submitted to Garcia and Auster for approval and then forwarded to him to sign and administer. Henriquez testified that he has issued "lots" of such reprimands and that management has never denied him approval to do so. Auster testified that he recalled Henriquez having issued written warnings to maintenance staff employees Carlos Pinto and Jose Vasquez.

The Employers contend that one memorandum issued by Superintendent Edwin Ramos to maintenance employee Don Deleon reflects a written reprimand. However, unlike the discipline issued by Rodriguez and Henriquez, the Deleon memorandum does not indicate that the subject of the document is a "reprimand" or that Deleon would be subject to future discipline for like conduct. The memorandum simply states that Deleon was made aware of the error by Ramos. At most, this can be considered an

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Rodriguez, covers for him on his day off.

[15] Rodriguez issued one written reprimand to Jose Melendez for not carrying out a work assignment given to him by Rodriguez and one warning to Juan Rivas for failing to report to work or notify his supervisor that he would be absent. Rodriguez also testified that he suspended and later discharged Rivas.

[16] Henriquez issued the written reprimand to William Alonzo for an unexcused absence and the suspension to Olympio Flores for an unexcused absence without notice.

isolated instance in which a verbal reprimand or direction has been reduced to writing and I treat it as such for purposes of the legal analysis below.

2. Verbal Reprimands

Garcia and Auster testified that all the superintendents have verbally reprimanded employees. However, the record does not indicate the frequency or details of such reprimands. Garcia testified that verbal warnings are not noted in the employees' files unless they are later referenced in written warnings issued by management or by a chief superintendent.

3. Recommendation of Employees for Discipline and Layoff

The Employers contend that superintendents not only possess the authority to issue discipline but effectively recommend it. In support of their position, the Employers introduced into evidence a handwritten statement prepared by superintendent Victor Pagan that recites the facts underlying the incident for which Juan Rivas was issued a written discipline by Rodriguez. Pagan testified that the discipline issued only after he repeatedly requested that Rivas be disciplined for poor attendance. Ultimately, Manuel Rodriguez asked Pagan to prepare the statement so the file would contain evidence to support a written warning. Pagan's statement contains no recommendation as to the discipline that Rivas should receive, and the written reprimand issued by Rodriguez does not indicate that the action was based upon a statement or recommendation by Pagan.

In addition to Pagan's written statement, chief superintendent Henriquez testified that Ramon Rodriguez, superintendent for the N.C. 100 buildings in Presidential Plaza, has requested that he (Henriquez) issue warnings to certain

employees. According to Henriquez, he has sometimes issued the warnings requested by Ramon Rodriguez and sometimes they have gone to speak with the employee about the matter. Henriquez did not testify to the frequency or details of Ramon Rodriguez's recommendations or whether he (Henriquez) conducted any independent investigation into employee misconduct.

The Employers further contend that superintendents have authority to recommend the layoff of employees. The evidence indicates that several temporary porters who worked at the Lincoln were laid off at the direction of management in a reduction of force once the apartments were prepared for the opening of those buildings. It is clear from the record that the decision to retain only three of the eleven temporary porters on a permanent basis was made by management. According to the Lincoln's superintendent Ariel Ralat, he recommended three porters for the permanent positions and those three porters were kept. The evidence does not reflect who made the actual decision or that temporary employees are commonly employed, laid off and/or whether superintendents select among such employees for layoff on a regular basis.

3. Recommendation of Employees for Hire and Promotion

The Employers contend that superintendents effectively recommend employees for hire and promotion. Regarding new hires, the Employers' evidence amounts primarily to generalized testimony by Garcia and Auster that superintendents have attended interviews and that maintenance employees cannot be hired without a superintendent's approval. Regarding promotions, Garcia testified that management deferred to superintendents' selection of handymen Vasquez, Vargas and Ralat for

superintendent positions.[17] Garcia testified that he accepted the superintendent's judgement regarding the promotion of Vargas because the promoted employee was "going to be one of their ranks." The evidence does not clearly disclose who made the hiring decisions at issue, what specific recommendations superintendents made regarding hires and promotions or what weight the decision-maker gave to such recommendations. Indeed, Pagan denied having recommended for hire the employees in whose interviews he participated.

4. Assignment and Direction of Work

Superintendents assign tasks to maintenance employees within the scope of work typically performed by them in their respective classifications. Auster testified that superintendents do not assign maintenance employees to perform work outside that of their classification. Nor does the evidence indicate that superintendents must determine which maintenance staff employee, within a given classification, is best suited to perform the work. Thus, superintendents distribute repair tickets to handymen or do the work themselves, depending on availability. It appears that only one handyman is on staff at each building at a given time and the doormen will sometimes notify the handyman directly that work is required.[18] Superintendents assign porters to

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[17] The evidence indicates that, pursuant to the collective bargaining agreements, handyman positions are generally posted and filled in order of seniority.

[18] Superintendents find out that the repairs are required primarily by receiving repair tickets from the management office. However, tenants will often call down complaints to the doorman who may notify either the superintendent or the handyman directly. Tenants sometimes, if they see the superintendent in the hall, tell the superintendent that a repair is required. Superintendents also find out that certain repairs are required when they inspect the properties.

clean vacated apartments and other areas of the property as management directs.[19] The evidence indicates that superintendents monitor and insure that assigned and regularly performed maintenance work is performed correctly.

The record reveals that some of these assignments occur on an emergency or unexpected basis. For example, if a water pipe breaks, an apartment needs to be prepared on an expedited basis for occupation or the superintendent finds a problem during his daily inspection, the superintendent will reassign staff within his building based upon work priorities or call another superintendent to release additional staff to assist him. Manuel Rodriguez testified that superintendents in Towers of America must notify him before they implement temporary building or shift reassignments.

Although superintendents assign maintenance work, some tasks are pre-scheduled, performed regularly and/or performed without being assigned. The management plan specifies that certain porter work be performed on a daily or weekly basis.[20] Doormen perform their work, such as greeting guests, accepting packages, monitoring equipment and keeping logs, largely on their own.[21]

The evidence indicates that superintendents participate in the assignment of overtime. When overtime is necessary to cover a shift or perform additional work, pursuant to the collective bargaining agreements, the building superintendent offers it

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[19] Management normally notifies superintendents that work is required during daily meetings or by walkie-talkie.

[20] The plans states that the compactor rooms and lobby floors must be cleaned twice daily, burnt out bulbs replaced daily, hallway floors are vacuumed three times per week, and the like.

[21] The evidence indicates that superintendents will sometimes direct a doorman to call an outside contractor to come fix a broken elevator. However, Pagan testified that the doormen often make such calls themselves.

to employees in order of classification seniority. Management also maintains certain standing policies regarding the assignment of overtime. In that regard, Manuel Rodriguez testified that superintendents know the assignment of overtime is pre-approved when necessary to cover a vacant shift. Management also requires doormen to remain at their post until relieved, even if that will require overtime work. Garcia testified that superintendents will sometimes direct doormen to stay at their post pursuant to management's relief policy.

Auster and Garcia testified that chief superintendents assist and guide other superintendents as well as the maintenance staff. Manuel Rodriguez testified that employees contact him when something happens that they cannot handle or to approve a temporary transfer of an employee from one building or shift to another. As an example of the former, Pagan testified that he called Rodriguez when a doorman complained about being required to work four hours overtime because his relief called in absent. Rodriguez called another employee to come in and replace the doorman on the shift. Pagan testified that he normally calls Rodriguez to obtain coverage or to consult him when overtime must be assigned. Garcia, Auster and Rodriguez testified that the individual superintendents may call for coverage and assign overtime without getting his authorization.

In addition to assigning individual tasks and overtime, superintendents are responsible for preparing the schedule for maintenance employees. Auster testified that he must approve permanent shift changes, but that temporary shift changes can be effectuated by the individual superintendents. Maintenance employees schedule vacation by submitting request forms to the superintendents. The superintendent then

submit the requests to Auster, who keeps a master chart of employee vacation time and notifies the superintendents of any conflicting requests among employees in their buildings. Although Auster testified that superintendents retain final authority to resolve such conflicting requests, Pagan and Ralat denied it and Henriquez testified that he resolves such matters with Auster. Henriquez testified generally that the criteria considered in determining whether to approve conflicting requests are staffing levels and volume of work expected.

5. Adjustment of Grievances

The Employers contend that all superintendents adjust grievances by virtue of their involvement in grievance and arbitration proceedings between management and Local 734. Garcia and Auster testified that superintendents generally have participated as fact witnesses on behalf of the companies in such proceedings and that management has discussed such grievances with such superintendent witnesses. The identity and details of those proceedings are scant on the record. Additionally, the evidence reflects that chief superintendent Henriquez investigated a grievance filed by a handyman who was skipped in seniority for the assignment of holiday overtime. Henriquez determined that the grievance was meritorious and adjusted the next week's payroll sheet to reflect the employee's lost overtime pay. The adjustment was not rejected by management.

6. Wages, Hours and Conditions of Employment

Garcia testified that superintendents earn flat salaries between $675 and $750 depending upon seniority and merit increases.[22] Chief superintendents Rodriguez and

[22] Garcia testified that Pedro Rodriguez earns about $675, Ramón Rodriguez earns about $705 or $710, Pagan and Vargas ear about $725, Ramos earns about $750.

Henriquez earn a weekly salaries of $825 and $950, respectively. Superintendents are scheduled to work five days (40 hours) per week and do not earn overtime. Superintendents in Towers of America cover for each other when they are off from work, as do superintendents in Presidential Plaza.[23] Superintendents receive annual bonuses usually equivalent to three weeks salary, a free furnished apartment and a 401(k) plan. Maintenance employees do not receive such benefits.[24] Each superintendent has a work shop in his respective building. The two chief superintendents and Ramon Rodriguez also have an office in the lobby of the buildings in which they work. Superintendents wear essentially identical uniforms as the maintenance staff.

E. OPERATIONS

The payroll procedures appear standard for all nine buildings. Maintenance employees punch time clocks. There is one time clock per building owner for employees who work in their respective building(s). The superintendents collect employee time cards on a weekly basis and prepare payroll sheets for the maintenance staff and themselves. The superintendents sign the payroll sheets they prepare and submit them to Garcia and Auster for their review and signature. The payroll sheets are then sent to a payroll company that prepares the paychecks based on the hours authorized by management. Office Manager Christine Rodriguez deals with the

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[23] The Lincoln's superintendent testified that the utility man, supervised by Manuel Rodriguez, covers for him on his days off. If a superintendent is absent, he will notify Auster or Garcia.

[24] Contributions are made on behalf of the maintenance staff to Local 734's pension fund.

payroll company on related matters as necessary. Once the paychecks are prepared, they are picked up by employees at the management office.

Garcia prepares the budget and tracks expenses for each owner separately. Thus, according to Garcia, if a maintenance employee is assigned from the building of one owner to another, the corresponding payroll expense is deducted from the owner losing an employee and charged against the owner gaining that employee for the work performed. Budget and payroll documents were not entered into evidence and the record does not clearly establish whether the wages paid to superintendents are allocated between the owners' budgets like maintenance employees.

II. ANALYSIS AND CONCLUSIONS

A. THE EMPLOYERS AND THE PETITIONED-FOR UNIT

The petitioner has petitioned for an employerwide unit, consisting of the management companies and seven building owners, as joint or single employers between and among them, covering all eight superintendents. The parties stipulated at hearing that N.C. 100 and N.C. 200 employ the Presidential Plaza superintendents. The parties further stipulated that, in the even the superintendents are not found to be supervisors, a unit of non-supervisory superintendents employed by N.C. 100 and N.C. 200 constitute an appropriate unit for purposes of collective bargaining.

I find that the management companies are a single employer of the superintendents. I further find that each building owner is, individually except for N.C. 100 and N.C. 200 together, a joint employer with the management companies of the superintendent who works in its respective building. However, relying primarily on the Board's decision in *Greenhoot, Inc.*, 205 NLRB 250 (1973) as clarified in *M.B. Sturgis,*

Inc., 331 NLRB No. 173 (2000), I find, for reasons described more fully below, that the unit sought is not appropriate.

1. The Management Companies – Single Employer

The term "single employer" applies to situations where apparently separate entities operate as an integrated enterprise in such a way that "…for all purposes, there is in fact only a single employer." *NLRB v. Browning-Ferris Industries,* 691 F.2d 1117 (3d Cir. 1982). The Board examines four principal factors in determining whether separate entities constitute a single employer. These factors are: (1) interrelation of operations, (2) common management, (3) centralized control of labor relations and (4) common ownership and financial control. *NLRB v. Browning-Ferris Industries*, supra; *Continental Radiator Corp*, 283 NLRB 234 at fn. 4 (1987). No one of the four criteria is controlling nor need all be present to warrant a single employer finding. *Blumenfeld Theaters Circuit,* 240 NLRB 206, 215 (1979); *Emsing's Supermarket*, 284 NLRB 302 (1987). The Board has stressed that the first three factors are more critical than common ownership, with particular emphasis on whether control of labor relations is centralized, as these tend to show "operational integration." *NLRB v. Al Bryant, Inc.*, 711 F.2d 543, 551 (3d Cir. 1983) and cases cited therein; *Airport Bus Service*, 273 NLRB 561 (1984), disavowed on other grounds in *St. Marys Foundry Co.*, 284 NLRB 221 fn. 4 (1987). "[S]ingle employer status depends on all the circumstances of the case and is characterized by absence of an arm's length relationship found among unintegrated companies." *NLRB v. Al Bryant, Inc.,* supra; accord: *Hahn Motors*, 283 NLRB 901 (1983).

Although the Employers contend that PPM and TAM are separate entities, the evidence reveals that they operate as a single integrated enterprise. As indicated above, PPM and TAM have identical management and nearly identical office staff who hold the same titles and perform the same functions for both companies in their common office at 25 River Court. PPM and TAM report to common upper management employed by Mid-State and Mid-State supplies a human resources department for employees of all nine buildings. Although the record does not reflect who owns PPM and TAM, the evidence indicates some degree of common financial control on other than an arm's length basis. Garcia testified that he is paid by PPM, even though he works for TAM. There is no evidence that PPM and TAM both contribute to wages or compensate each other for work performed by Garcia for those respective entities.

The record further reveals that PPM and TAM operations, including labor and personnel matters, are standard and centrally administered. PPM and TAM conduct all labor relations and retain ultimate responsibility for hiring, firing and supervising office staff, superintendents and maintenance employees. There is significant temporary interchange among superintendents in the Lincoln and Towers of America as there is among superintendents in Presidential Plaza. Although there is less interchange and contact between superintendents in the two building clusters, there is some when work in one complex is particularly voluminous or in the event of an emergency.

The same payroll procedure and payroll company are used for all nine buildings. Although the various superintendents prepare the payroll sheets, they are reviewed and authorized centrally by Garcia and Auster. Maintenance employees and superintendents perform the same functions within their classification from building to

building. They have equivalent intra-classification wages, hours and working conditions. Personnel files are kept centrally at the PPM/TAM office and a common employee handbook applies to employees in all nine buildings. The record also indicates that PPM and TAM use identical management agreements, which describe in significant detail their identical operations and structure.

Based on all the foregoing, noting the common management, common control of labor relations and personnel matters and integration of operations, I find that PPM and TAM are single employers of the petitioned-for units. See *Alexander Bistritzky*, 323 NLRB 524 (1997).

2. Management Companies, Building Owners and the Unit(s)

The issue outstanding is whether the remaining employers are joint or multiple between and/or among them and whether the petitioned-for overall unit is appropriate. Although I find that six separate joint employer relationships exist between the management companies and the owners, I find that the petitioned for unit is not appropriate.

The Board has long held that multiple employers cannot be compelled to bargain together with the representative of a single unit unless they voluntarily consent, by word or deed, to do so. *Greenhoot, Inc.*, 205 NLRB 250 (1973); *Van Eerden Co*., 154 NLRB 496 (1965); *American Publishing Corp.*, 121 NLRB 115 (1958). In *Greenhoot*, supra, the Board refused to certify as appropriate what it found to be a multiemployer unit of engineers and maintenance employees. The petitioned for employers were 14 building owners and their common management company (Greenhoot). Instead of certifying an overall unit employed by all employers named in

the petition, the Board found appropriate separate units consisting of the employees of each building managed by Greenhoot and each building owner, as joint employers. In so holding, the Board noted the absence of employee interchange among the buildings and the continued involvement of the building owners in work related matters. Thus, in *Greenhoot*, each building owner retained a discrete employment relationship with the unit employees and did not establish a relationship other than their arbitrary selection of a common managing agent.

The Board's recent decision in *M.B. Sturgis*, 331 NLRB No. 173 (2000) did not overrule *Greenhoot*. The Board merely held that, under certain circumstances, without establishing consent among multiple employers to bargain collectively, employees supplied by one employer (e.g., a temporary agency) to work for a user employer may be included in a single appropriate unit with the user's employees. The Board will find such an overall unit appropriate if the user and supplier are deemed joint employers of the supplied employees and if the supplied/user employees share a community of interests. The Board reasoned that the "scope of a bargaining unit is delineated by the work being performed for a particular employer" and distinguished Greenhoot which "involved multiple user employers whose only relationship to each other is that they obtain employees from a common supplier employer." *Id.* The Board noted that in *Greenhoot* situations, "the union seeks to represent a unit that includes employees of all of the users" and "it is clear that the unit is a multi-employer unit [requiring] consent of the separate user employers . . . before the Board could direct an election." *Id.*

In reaffirming but limiting *Greenhoot*, the Board stated in *M.B. Sturgis*:

> If the petitioner names only the supplier employer in its petition, there is no statutory impediment to a supplier wide unit under the Act.

> Hence, while we are today reaffirming Greenhoot, we wish to make clear that Greenhoot's requirement of employer consent to the creation of a multiemployer unit has no application when the bargaining relationship sought is only with the supplier employer.
>
> Hence, we limit Greenhoot: a petition that names as the employer unrelated employers will be treated as seeking an inappropriate multemployer unit absent consent of all the employers; a petition that seeks a unit only of employees supplied to a single user, or seeks a unit of all employees of a supplier employer and names only the supplier employer, does not involve a multiemployer unit.

Id.

Here, the petitioner did not simply petition for a unit employed by the management companies (the supplier), but named the owners (users) as well. How then, does the petitioner distinguish *Greenhoot*? I find, applying the foregoing principles, that it cannot.

I initially find that, as in *Greenhoot*, the management companies and the building owners individually, except for N.C. 100 and 200 together, are joint employers of their respective superintendents. Entities are joint employers where from the evidence it can be shown that they "exert significant control over the same employees--where from the evidence it can be shown that they share or co-determine those matters governing essential terms and conditions of employment." *NLRB v. Browning–Ferris Industries*, 691 F.2d 1117, 1124 (3rd Cir. 1982), adopted by the Board in *TLI/Crown Zellerbach Corp*., 271 NLRB 798 (1984). The Board defined the essential terms and conditions referred to in the joint employer criteria in *Laerco Transportation,* 269 NLRB 324, 325 (1984) as hiring, firing, disciplining, supervising and fixing the rates of remuneration. In *Southern California Gas*

Co., 302 NLRB 456 (1991), the Board identified the issue to be resolved in joint employer cases as whether the employer exercises or has the right to exercise sufficient control over labor relations policies or over the wages, hours and working conditions of the employees from which it may be reasonably inferred that the joint employer is in fact an employer of the employees. In addition to these concepts of common control, "[t]he term 'employer' includes any person acting as an agent of an employer, directly or indirectly ...." *Union Carbide Building Co*, 269 NLRB 144, 145 (1984) quoting *NLRB v. New Madrid Mfg*. Co., 215 F.2d 908 (8th Cir. 1957).

Here, by the express terms of the managing agreements, the management companies are retained as agents of the owners to hire, fire, discipline and to establish wages, hours and other terms and conditions of employment of the superintendents. The owners maintain responsibility for paying all compensation payable to the superintendents and for reviewing and approving their respective budgets, including payroll. The owners in these proceedings also claim to employ the superintendents who work in their respective buildings. On that basis and the record as a whole, I find that the management companies and each separate owner (except N.C. 100 and N.C. 200) are joint employers of the superintendents in each owner's respective building(s). See *Marcus Management, Inc.*, 292 NLRB 251 (1989); *Union Carbide Building Co*, supra (1984).

My finding that the building owners are separate joint employers of the superintendents, along with the management companies, does not remove this case

from a *Greenhoot* analysis. We are left with seven building owners (multiple users as in *Greenhoot*), each of whom jointly employs one or more superintendents with the management companies.[25] The petitioner has not established a single employer relationship among the owner/users. In that regard, the record evidence does not clearly establish common ownership among the users or a history of common labor relations. The building owners have negotiated separate collective bargaining agreements with Local 734. The record also reveals no details regarding the operations of the owners other than personnel matters described above. Although the evidence reflects that superintendents are commonly managed, supervised in clusters by the Chief Superintendents and have some degree of interchange, I find that such interrelation is insufficient to establish the owners' single employer status. See *Northern District of Connecticut Iron Workers Local Union No. 15*, 306 NLRB 309 (1992).

Accordingly, since the petitioner has petitioned for a unit of superintendents employed by the management companies and multiple unrelated building owners, the petitioner must establish that employers involved herein have voluntarily consented to bargaining collectively. *Greenhoot*, supra; *M.B. Sturgis*, supra. As the record evidence contains no consensual basis for finding a multiemployer unit, I find that six separate

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[25] In *Brown-Ferris Industries*, the Third Circuit outlined fundamental distinctions between single and joint employers as follows:

> In contrast [to the single employer analysis], the "joint employer" concept does not depend upon the existence of a single integrated enterprise and therefore the above-mentioned four factor standard is inapposite. Rather, a finding that companies are "joint employers" assumes in the first instance that companies are "what they appear to be" – independent legal entities that have merely "historically chosen to handle jointly . . . important aspects of their employer-employee

units of superintendents jointly employed by the management companies and the six building owners (N.C. 100/N.C. 200 being one owner) would normally be appropriate. However, since the Riverside, East Hampton, South Hampton, and the Lincoln units have only one superintendent, I dismiss the petition as it pertains to them. I also dismiss the petition as it pertains to the Atlantic, which has no unit employees.[26] *Cutter Laboratories*, 116 NLRB 260 (1956). Accordingly, the only remaining appropriate unit is a unit of superintendents employed by the management companies and N.C. 100/N.C. 200.[27] *Id.*

B. SUPERVISORY STATUS OF THE SUPERINTENDENTS

The Employers contend that the superintendents are supervisors under Section 2(11) of the Act. The petitioner admits in its brief that Chief Superintendent Manuel Rodriguez is a statutory supervisor and I find that he, as well as Chief Superintendent Jose Henriquez, do in fact possess and exercise supervisory authority. I further find that superintendents below Rodriguez and Henriquez are not supervisors within the meaning of the Act.

Section 2(11) of the Act defines a supervisor as:

> [A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with

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relations. *Checker Cab Co. v. NLRB*, 367 F.2d 692, 698 (6th Cir. 1966).

[26] The Atlantic unit contains no unit employees because I find that Chief Superintendent Rodriguez, who works in the Atlantic, is a supervisor within the meaning of the Act.

[27] In the event the Petitioner does not wish to proceed to an election in the one unit found appropriate, it shall so notify the Regional Director by written notice within 7 days of the date of issuance of this Decision.

> the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

It is well established that an individual need possess only one of the enumerated indicia of authority in order to be encompassed by the definition, as long as the exercise of such authority is carried out in the interest of the employer and requires the exercise of independent judgment. *Big Rivers Electric Corp.*, 266 NLRB 380, 382 (1983). The legislative history of Section 2(11) indicates that Congress intended to distinguish between employees commonly referred to as "straw bosses" or leaders, who may give minor orders and oversee the work of others, but who are not necessarily perceived as part of management, from those supervisors truly vested with genuine management prerogatives. *George C. Foss Co.*, 270 NLRB 232, 234 (1984). The exercise of some supervisory authority in a merely clerical, perfunctory or sporadic manner does not require a finding that an employee is a supervisor within the meaning of the Act. *Somerset Welding & Steel*, 291 NLRB 913 (1988). Designation of an individual by title as a supervisor in a job description or other documents is insufficient to confer supervisory status. *Western Union Telegraph Company*, supra, 242 NLRB at 826. Rather, the question is whether there is evidence that the individual actually possesses any of the powers enumerated in Section 2(11). *Id.*

The Board takes care not to construe supervisory status too broadly because the employee who is deemed a supervisor loses the protection of the Act. *Warner Co. v. NLRB,* 365 F. 2d 435, 437 (3rd Cir. 1966). The burden of proving supervisory status rests on the party asserting that status. *Benchmark Mechanical Contractors Inc.,* 327 NLRB No. 151 (1999). The mere issuance of a directive setting forth supervisory authority is not determinative of supervisory status. *Bakersfield Californian*, 316

NLRB 1211 (1995); *Connecticut Light & Power* Co., 121 NLRB 768, 770 (1958). Absent detailed, specific evidence of independent judgment, mere inference or conclusionary statements without supporting evidence are insufficient to establish supervisory status. *Quadrex Environmental Co.,* 308 NLRB 101 (1992); *Sears Roebuck & Co.***,** 304 NLRB 193 (1991). Whenever evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, the Board will find that supervisory status has not been established, at least not on the basis of those indicia. *Phelps Medical Center*, 295 NLRB 486, 490 (1989).

1. Chief Superintendents

The Employers contend and I find that Chief Superintendents are supervisors by virtue of their authority to discipline, suspend and discharge employees. Rodriguez has discharged multiple employees upon his own initiative and his decisions in that regard have not been countermanded by management when they were notified after the fact. Chief Superintendents Rodriguez and Henriquez have also administered written warnings and suspensions to maintenance employees. Henriquez testified on direct examination that he has issued lots of such reprimands and that management has never denied a disciplinary action which he routinely submits to them for review. Based upon the disciplinary authority which Chief Superintendents possess and exercise, I find them to be statutory supervisors.[28] *Concourse Village, Inc.*, 276 NLRB 12 (1985) (discipline by building superintendents entered into personnel files as step in employers

[28] The Employer contends that all superintendents have the same authority to discipline, suspend, layoff and discharge employees, even though only chief superintendents have exercised such authority. The Board has long held that supervisory authority cannot be found based on an alleged authority that has not in fact been exercised. *Northwest Steel,* 200 NLRB 108 (1972).

progressive disciplinary procedure renders them supervisors).[29] Accordingly, I will exclude Henriquez from the unit found appropriate herein.

2. Superintendents

The Employers also contend that the front line superintendents are supervisors. I reject the Employers' contention and find that the superintendents do not regularly exercise supervisory authority under Section 2(11) of the Act. Addressing first the assignment and direction of work, the Supreme Court recently stated, "Many nominally supervisory functions may be performed without the 'exercis[e of] such a degree of …judgment or discretion…as would warrant a finding of supervisory status under the Act." *Kentucky River Community Care, Inc.*, 121 S. Ct. 1861, 1867 (2001), citing *Weyerhaeuser Timber Co.,* 85 NLRB 1170, 1173 (1949). Additionally, while the Court explicitly refrained from interpreting the phrase "responsibly to direct," the Court suggested that the Board could interpret this phrase by "distinguishing between employees who direct the manner of others' performance of discrete tasks from employees who direct other employees." *Id*. at 1871, citing *Providence Hospital*, 320 NLRB 717, 729 (1996). The Board in *Providence Hospital* quoted with approval the court in *NLRB v. Security Guard Service,* 384 F. 2d 143, 151(5th Cir. 1967):

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[29] In its brief, the Petitioner contends that *Condcourse Village, Inc.* is inapposite because the record does not establish a clear disciplinary procedure, which was not show to have definite and severe consequences for employees' employment status. I find the Petitioner's factual contention is incorrect. Henriquez testified to a standard procedure for issuing discipline and suspensions and discharges have an immediate and severe impact on employees. The evidence also indicates that discipline, in the case of Juan Rivas, was followed by discharge. As discussed below, the alleged verbal reprimands issued by front line superintendents are distinguishable from disciplines issued by superintendents in *Concourse Village, Inc.*

> If any authority over someone else, no matter how insignificant or infrequent, made an employee a supervisor, our industrial composite would be predominantly supervisory. Every order-giver is not a supervisor. Even the traffic director tells the president of a company where to park his car.

The assignments at issue here are to specific tasks regarding established duties that maintenance employees routinely perform on their own, not assignments involving overall job responsibilities. In that regard, the tasks are directed in accordance with the scope of practice of each of the classifications, which is well defined. *Bozeman Deaconess Foundation*, 322 NLRB 1107 (1997). Whether such "assignments" are denoted by the statutory term "assignment," as opposed to the term "responsibly to direct" is not clear. See *Providence Hospital*, supra, 320 NLRB at 727. However, under either statutory phrase, the assignments at issue here are not characteristic of those of "supervisors who share management's power or have some relationship or identification with management" and are thus distinguishable from "skilled nonsupervisory employees whose direction of other employees reflects their superior training, experience or skills." See *id.* at 729.

The evidence further shows that superintendents' direction of the maintenance staff is routine in that it depends merely on what needs to be done and who is available at that particular time. There is no showing that independent judgment is required to select among employees or that it is necessary for the superintendents to resolve conflicts or problems with respect to the tasks to be performed or the skills or strengths of the employee. See *Clark Machine Corp.,* 308 NLRB 555, 555-56 (1992) (assignments are routine when based on employees' skills that are well known).

Nor do maintenance assignments amount to "responsible direction" within the statutory sense. "Responsible direction" connotes accountability. *Providence*

Hospital, supra at 727-30. There is no evidence that superintendents are held responsible for the work of the maintenance employees.

Beyond assignment of individual tasks and direction of work, the Employers contend that superintendents are supervisors because they assign overtime, call for coverage and authorize vacations. The assignment of tasks in accordance with an Employer's set practice, pattern, parameters or protocol will also fail to establish independent judgment necessary for a supervisory finding. *Kentucky River*, supra at 1867; *Chevron Shipping Co.*, supra at 381; *Express Messenger Systems*, 301 NLRB 651, 654 (1991); *Bay Area-Los Angeles Express*, 275 NLRB 1063, 1075 (1985). Moreover, proof of independent judgment in the assignment or direction of employees entails the submission of concrete evidence showing how such decisions are made. *Harborside Healthcare, Inc*., 330 NLRB 1334, 1336 (2000); *Crittenton Hospital*, supra*; Quadrex Environmental Co*., supra; *Sears Roebuck & Co.,* supra. In *Crittenton Hospital*, supra*,* the Employer argued that individuals at issue were supervisors because they had the power to make mandatory overtime assignments and call in substitutes based on their assessment of whether staffing is adequate. However, there was "no evidence showing how mandatory overtime or additional staffing needs are determined, or the process by which employees are selected for overtime or call-in. Thus, the employer … failed to demonstrate that RNs utilize independent judgment." See also *Harborside Healthcare, Inc*., supra at 1336 (charge nurses' call-in authority was not supervisory in the absence of evidence disclosing how they decided which employees to call).

Here, the collective bargaining agreements covering the maintenance employees require that overtime, including overtime incidental to coverage for an absent employee, be assigned by classification seniority. Management also maintains a general policy of allowing overtime to cover shifts and requiring doormen to remain at their post. These guidelines have the effect of severely limiting superintendent discretion. See *Macy's West, Inc.*, 327 NLRB 1222 (1999) (chief engineer not supervisor despite calling employees for overtime where manager maintains policy that such overtime will be approved).

In addition, the evidence does not establish what considerations, other than the availability of present staff, are reviewed by superintendents in determining whether to call for employee coverage when necessary. The same record deficiency applies to alleged superintendent resolution of conflicting employee vacation requests. The evidence does not clearly establish, with specificity, what criteria are used to resolve those matter or even that superintendents make such decisions regarding vacation.[30] The frequency of such vacation decisions is also unknown. Such limited record evidence of discretion exercised by superintendents regarding coverage and vacation, particularly considering the unknown frequency when vacation conflicts arise, is not

[30] The Employers contend that superintendents must consider work priorities in determining whether to grant two employees' conflicting vacation requests, reassign employees in an emergency or call employees for overtime. However, such judgment is not of a type that confers supervisory status. The evidence does not indicate that, once the superintendent makes a determination regarding work priorities, the personnel decision to address that priority is other than routine, and it is the personnel decision that we are concerned with herein. *Tree-Free Fiber Co.*, supra (team leader authority to prioritize work does not establish independent judgement).

sufficient to establish supervisory status. *Crittenton Hospital*, supra.; *Somerset Welding & Steel*, supra.

In sum, I find that, based on the forgoing, superintendents do not have authority to assign or responsibly direct work, using independent judgment. See *Concourse Village, Inc.* 276 NLRB 12 (1985).

The Employers contend that all superintendents are supervisors because they administer verbal reprimands to maintenance employees. However, I find that the "reprimands" are more in the nature of direction than discipline and, for the reasons described above regarding superintendent direction, do not require independent judgment necessary to establish supervisory status. Verbal reprimands are not reduced to writing or recorded in an employee's personnel file. The evidence does not indicate that superintendents, as a practice, tell employees they are being disciplined when such verbal reprimands are administered or that future discipline will be forthcoming if the conduct at issue continues. I am also mindful that the management plans entered into evidence do not list, among superintendent responsibilities, discipline or discharge of employees. Indeed, the management agreements expressly direct the management companies, who deny that they employ the superintendents, to supervise and discharge employees.

Turning to the question whether superintendents effectively recommend employees for hire, promotion, layoff and discipline, I note that the Board has consistently applied the principle that authority "effectively to recommend" generally means that the recommended action is taken without independent investigation by superiors, not simply that the recommendation is ultimately followed. *Hawaiian*

Telephone Co., 186 NLRB 1 (1970). Accord**,** *Brown & Root, Inc.***,** 314 NLRB 19, 23 (1994); *Polynesian Hospitality Tours*, 297 NLRB 228, 234 (1989), enfd. 920 F.2d 71 (D.C. Cir. 1990); *Ball Plastics Division*, 228 NLRB 633, 634 (1977); *Risdon Mfg. Co.,* 195 NLRB 579, 581 (1972). The burden of proving independent judgment rests with the party attempting to prove supervisory status. *Wilson Wholesale Meat Company, Inc.*, 209 NLRB 222 (1974) (supervisory burden not satisfied absent evidence that alleged supervisor's recommendations would not be investigated independently by management). This burden requires the introduction of specific evidence establishing the criteria and discretion used by alleged supervisors in recommending personnel actions. *Tree-Free Fiber Co*., 328 NLRB 389 (1999) (team leaders not supervisors absent specific evidence of factors that guided their employment recommendations).

Here, the role and weight afforded by management and supervisors to superintendent recommendations were not clearly established. Thus, management attended all pre-hire interviews along with superintendents and apparently retained final hiring authority. Herniquez sometimes talked directly to employees that Roman Rodriguez recommended for discipline. The details of and criteria for any alleged recommendations made by superintendents in these situations were not established on the record.[31] Also, Pagan was directed by Manuel Rodriguez to provide a statement supporting a discipline to be issued to Juan Rivas, rather than the reverse. See *Tree-*

[31] Although it appears that Garcia may have deferred to the superintendents' collective decision to promote Vargas because it was with them Vargas was going to work, such personal compatibility recommendations are not sufficient to confer supervisory status. *Tree-Free Fiber Co.*, supra.

Free Fiber Co., supra, (managerial instruction to alleged supervisor regarding disciplinary action to take undermined finding of independent judgment).

The evidence also fails to establish that superintendents recommend such personnel action on other than an irregular and sporadic basis. Maintenance staff promotions are posted by seniority and the record reflects that superintendents were only involved in the promotion of three handymen into their ranks. Moreover, the evidence indicates that superintendents participate in layoffs only in the rare cases when new buildings are being prepared to be opened. Such limited and isolated recommendations do not confirm supervisory authority. *Somerset Welding & Steel*, supra.

Likewise, the evidence does not reflect that front line superintendents play a significant role in the adjustment of grievances. Auster testified that he was unaware of any front line superintendent who has adjusted grievances. The record evidence does not indicate which or how often the front line superintendents testified for the company in grievance proceedings. Moreover, mere factual testimony of an employee on behalf of the Employers in grievance proceeding does not constitute the exercise of supervisory authority.

Based on all of the aforementioned factors and the record as a whole, I find that superintendents are not supervisors within the meaning of Section 2(11) of the Act, and a unit of superintendents is appropriate.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of

election to issue subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who are employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States Government may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by **Local 971, International Shield of Labor Alliances (ISLA).**

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties in the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear**, Inc.,* 156 NLRB 1236 (1966); *NLRB v.* *Wyman-Gordon Company,* 394 U.S. 759 (1969). Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, two (2) copies of an election eligibility list, by location, containing the full names and addresses of all the eligible

voters shall be filed by the Employer with the undersigned, who shall make the list available to all parties to the election. *North Macon Health Care Facility,* 315 NLRB 359 (1994). In order to be timely filed, such list must be received in NLRB Region 22, 20 Washington Place, 5th Floor, Newark, New Jersey 07102, on or before August 9, 2002. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. This request must be received by the Board in Washington by August 16, 2002.

Signed at Newark, New Jersey this 2nd day of August, 2002.

_____

Gary T. Kendellen
Regional Director
NLRB Region 22
20 Washington Place, 5th Floor
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